

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

O.M.,

Claimant,

OAH No. 2012080719

and

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Lancaster, California on November 8, 2012. Claimant's mother represented claimant.¹ Stella Dorian, Contract Officer, represented North Los Angeles County Regional Center (NLACRC or service agency).

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on December 28, 2012.² The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

The issue presented is whether claimant may roll over five authorized, but unused out-of-home respite days from fiscal year 2012 for use in fiscal year 2013.

¹ Initials are used to preserve confidentiality.

² At the conclusion of the November 8, 2012 hearing in this matter, the record was closed and the matter was submitted for decision. Upon later review, the Administrative Law Judge re-opened the record for submission of additional evidence consistent with a Post-Hearing Order Re-Opening Record for Submission of Additional Evidence dated November 26, 2012. On December 11, 2012, NLACRC submitted the Declaration of Latonia Rogers, to which claimant has raised no objections. The declaration is marked for identification and entered in evidence as Exhibit 9.

FACTUAL FINDINGS

1. Claimant is a 13-year-old consumer of NLACRC based on her qualifying diagnosis of Autistic Disorder. Claimant resides with her mother.

2. During fiscal year 2012, NLACRC authorized 21 days of out-of-home respite care services to claimant. Claimant used 16 of those out-of-home respite care service days within fiscal year 2012. Claimant has requested rolling over the remaining authorized, but unused five out-of-home respite care service days in Fiscal Year 2013. NLACRC's policy guidelines and practice do not permit consumers to roll authorized, but unused days of out-of-home respite care services over from one fiscal year to another fiscal year. By letter dated August 8, 2012, NLACRC denied claimant's request. On August 16, 2012, NLACRC received a Fair Hearing Request on claimant's behalf. These proceedings ensued.

3. Mother is vendored to procure respite services from a respite worker. Mother procured claimant's paternal grandmother to provide claimant's respite care services. At all times relevant to this matter, claimant had an ovarian cyst which caused her discomfort. Claimant had difficulties sleeping through the night, and mother was required to spend more time caring for claimant during claimant's extended periods of wakefulness. Mother experienced sleep deprivation. In anticipation of claimant's spring break from school, mother requested using 17 days of out-of-home respite care service.

4. Upon notification of a consumer's request to use authorized out-of-home respite care services, NLACRC's practice is to identify an appropriate residential facility. Once the residential facility has been secured, NLACRC authorizes the funding of the requested number of out-of-home respite days and forwards the funding to the residential provider.

5. NLACRC was unable to secure an opening at an appropriate out-of-home respite care facility for claimant for the requested time period. As an alternative, NLACRC proposed that mother modify her request for out-of-home respite care services and instead secure respite care for claimant in the form of in-home respite care services. Obtaining such in-home-respite-care services, however, required using a conversion agency, which is an entity vendored by NLACRC to provide respite services. Mother declined the use of a conversion agency because it required claimant's respite worker, the grandmother, to meet certain criteria including CPR and first aid training, which grandmother, although a registered nurse, did not want to undergo.

6. Thereafter, pursuant to a May 25, 2012 Final Mediation Agreement, mother agreed to use a Financial Management Service (FMS) provider to purchase 17 days of out-of-home respite care services for claimant. With this alternative, mother, as the employer of record, is permitted to retain grandmother as claimant's respite worker, and the FMS provider assists mother to ensure compliance with labor laws and delivery of service.

7. The FMS service provider model was recent to NLACRC in that it was just implemented in January 2012. As a consequence, NLACRC personnel were not yet fully knowledgeable about all of its features and requirements. For example, it was known that mother was required to secure an Employer Identification Number (EIN) and worker's compensation insurance. Mother secured an EIN. Questions arose, however, regarding the required amount of worker's compensation coverage. After an initial investigation into the matter, NLACRC personnel believed that a minimum of \$1 million of liability coverage was required, and NLACRC personnel advised mother accordingly. Mother was unable to secure a \$1 million worker's compensation insurance policy, and therefore revived her option to use a conversion agency. By the time the paperwork for initiating mother's use of a conversion agency to provide 17 days of respite care services was completed only 12 days remained in the 2012 fiscal year. This meant that mother would not be able to use five of the 17 days of previously authorized out-of-home respite care services for claimant before the 2012 fiscal year expired.

8. At the hearing, the service agency representative testified that, after receiving claimant's request for a fair hearing, she queried further into the coverage requirements and ultimately determined that the information that \$1million coverage was required for worker's compensation insurance was erroneous. According to the service agency representative, a March 3, 2012 memorandum referencing "Service Provider Insurance Policy" (SPIP) establishes that parent vendors such as mother are exempt from such coverage requirements. (Ex. 5.) NLACRC personnel present at the mediation were ignorant of the requirements outlined in the SPIP memorandum. The service agency representative took responsibility for and apologized to mother for not knowing the correct worker's compensation requirements so that the full terms of the May 25, 2012 Final Mediation Agreement could have been implemented before expiration of the 2012 fiscal year.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disability Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.), which mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined through the individualized program planning process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic rehabilitation

or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (Welf. & Inst. Code, § 4512, subd. (b).)

3. Services and supports include out-of-home care, for which section 4686.5, subdivision (a)(2), authorizes the purchase of a maximum of 21 days in a fiscal year, unless, as provided for in subdivision (a)(3)(A), grounds for an exemption exists:

(2) A regional center shall **not purchase more than 21 days of out-of-home respite services in a fiscal year** nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3) (A) A regional center may grant an exemption to the requirements set forth in paragraph[] . . . (2), if it is demonstrated that the intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impact the family member’s ability to meet the care and supervision needs of the consumer.

(Bold emphasis added.)

4. When purchasing services and supports a regional center must conform to its purchase of service policy guidelines and practices. (Welf. & Inst. Code, § 4646.4, subd. (a)(1).) The Lanterman Act requires the Department of Developmental Disability (Department) to review the guidelines “to ensure compliance with statute and regulation.” (Welf. & Inst. Code, § 4434, subd. (d).) Reflecting the Department’s interpretation of statute and regulation, the purchase of service policy guidelines are not entitled to the deference given to a regulation; rather, the purchase of service policy guidelines are entitled to a degree of deference that is dependent on the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) Most important, a regional center’s implementation of its purchase of service policy guidelines must account for a consumer’s individual needs when making determinations regarding the appropriateness of particular services. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. In this case, claimant has the burden of establishing by a preponderance of evidence that she is entitled to roll over her authorized, but unused out-of-home respite days from one fiscal year to another. Evid. Code, §§ 115 (“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”) and 500 (“a party has the burden of proof as to each fact the existence of which is essential to the claim for relief or defense that he is asserting.”).)

6. NLACRC personnel working on claimant’s case were unaware of the minimum workers’ compensation insurance requirements because they were inexperienced implementing newly enacted mandates accompanying the use of FMS providers. Although NLACRC personnel were not wholly innocent, they acted without enmity. At most NLACRC personnel lacked a comprehensive understanding of or misunderstood the full

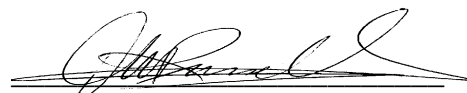
extent of the requirements of the FMS model and its component parts. This kind of misunderstanding is one which sometimes occurs with the implementation, by cautious and reasonable professionals, of new standards. Under these circumstances, NLACRC personnel's conduct is excusable and a departure from NLACRC's policy guidelines and practice is unwarranted. Importantly, section 4686.5, subdivision (a)(2), explicitly prohibits the purchase of more than 21 days of out-of-home respite services in a fiscal year. Thus, even assuming that NLACRC personnel were inclined to roll over 5 days of out-of-home respite services from the 2012 fiscal year and to fund those 5 days in the 2013 fiscal year in addition to the 21 days of out-of-home respite services that NLACRC may have already authorized for the 2013 fiscal year, section 4686.5, subdivision (a)(2), prohibits NLACRC personnel from doing so. NLACRC's policy guidelines and practice implement section 4686.5, subdivision (a)(2). Claimant is not precluded from demonstrating that she has intense care and supervision needs entitling her to additional out-of-home respite care services in excess of 21 days during the 2013 fiscal year as provided for in section 4686.5, subdivision (a)(3)(A).

7. Cause does not exist for North Los Angeles County Regional Center to depart from its policy guidelines and practice to permit claimant to roll over five authorized, but unused days of out-of-home respite care services from fiscal year 2012 for use in fiscal year 2013, by reason of Factual Findings 1 through 8, inclusive, and Legal Conclusions 1 through 6, inclusive.

ORDER

Claimant O.M.'s appeal is denied.

DATED: January 30, 2013



JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.